STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Lisa Deblois Charging Party	)	
v.	)	HRC Charge No.PA12-0005
DOC, DHR, AHS, AoA and SESCF Responding Parties	)	

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are reasonable grounds to believe that DOC, DHR, AHS, AoA and SESCF, the Respondents, illegally discriminated against Lisa Deblois, the Charging Party, in violation of the equal pay provision of the Vermont Fair Employment Practices Act.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent__	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For ✓	Against __	Absent __	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For ✓	Against __	Absent __	Recused __

Entry: ___Reasonable Grounds __ Motion failed

Dated at Winooski, Vermont, this 30th day of May, 2013

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers

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INVESTIGATIVE REPORT

E12-0006

CHARGING PARTY: Lisa Deblois

RESPONDING PARTIES: Vermont Department of Corrections (DOC); Vermont Department of Human Resources ("DHR"); Vermont Agency of Human Services (AHS); Vermont Agency of Administration (AoA) and Northern State Correctional Facility (NSCF).

CHARGE: Discrimination in Employment on the basis of sex in violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA).

SUMMARY OF CHARGE: In June of 2012,[1] Lisa Deblois, an Administrative Services Coordinator III at the Northern State Correctional Facility in Newport, Vermont, discovered that she was making approximately $10,200 less than a male co-worker, Mr. Doe,[2] who held the same position with the pay grade (PG 23), same job title – Administrative Services Coordinator III (ASC III) at the Department of Corrections (DOC). She asserted that she and Mr. Doe performed substantially similar work on jobs requiring equal skill, effort and responsibility under similar working conditions. As a result, Ms. Deblois filed a charge of discrimination with the Human Rights Commission alleging a violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA).

[1] After the reasonable grounds finding in Lynne Silloway's HRC case no. E11-0002.
[2] To protect his privacy, this employee is referred to throughout this report as "Mr. Doe."

SUMMARY OF RESPONSE: The State asserted that Ms. Deblois cannot make a prima facie case of discrimination and has listed the four statutory defenses available under VFEPA. The State denies Ms. Deblois and Mr. Doe do "equal work on jobs requiring equal skill, effort and responsibility" but offers no specific reasons why it takes this position. Furthermore, the State denies that Ms. Deblois and Mr. Doe perform their jobs "under similar working conditions" but again, offers no proof that this so. In the alternative, the State asserts that even if Ms. Deblois could make a prima facie case of equal pay discrimination, all available defenses under VFEPA apply and that Mr. Doe's salary is therefore legitimately higher than Ms. Deblois's. It is the State's burden to produce evidence and prove one or more of these defense(s) but it has presented no further evidence in support of them beyond mere assertion.

PRELIMINARY RECOMMENDATIONS:

(1) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Agency Human Services (AHS) discriminated against Ms. Deblois because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(2) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Department of Corrections (DOC) discriminated against Ms. Deblois because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(3) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Department of Human Resources (DHR), discriminated against Ms. Deblois because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(4) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Vermont Agency of Administration (AoA) discriminated against Ms. Deblois because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

(5) This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Northern State Correctional Facility (NSCF) discriminated against Ms. Deblois because of her sex, in violation of the equal pay provision of Title 21 V.S.A. §495(8)(A) of Vermont's Fair Employment Practices Act.

SUMMARY OF INVESTIGATION

Interviews

Lisa Deblois - Complainant – Administrative Services Coordinator III – Approximately twenty phone contacts between June 2012 and May 1, 2013.

Keith Tallon – Community Corrections District Manager, formerly Southern State Correctional Facility (SSCF) Superintendent from 2003-2005 – the "Appointing Authority" - 1/18/12

Chris Teifke –Operations Director for VSEA - 2/2/12

Molly Paulger - Director, Personnel Division Services & Operations – the "Hiring Authority" in DHR who had ultimate approval over the DOC's request to hire Mr. Doe into-range– 2/9/12

Mr. Doe– Administrative Services Coordinator III - 3/26/12

Anita Carbonell – Former Superintendent at MVRCF, Southeast and Southern State Correctional Facilities; Supervised Ms. Silloway and Mr. Doe and another ASCIII at another facility – 10/17/2012

Documents/Research

a. Charge of Discrimination alleging a violation of the equal pay provision of the Vermont Fair Employment Practices Act (VFEPA)

b. State's Response to Charge – 7/30/12

c. VSEA Supervisory Collective Bargaining Agreement

d. Vermont Personnel Policy & Procedures Manual

e. Equal Employment Opportunity Commission (EEOC) Compliance Manual

f. Personnel division data on promotion and pay grade/step movement

g. Personnel division data on hire-into-range figures between 2000-2010

h. Statutes/case law/law review articles/treatise extracts

i. Review of legislative history file of Vermont's Equal Pay Act provision

j. Pay history of Mr. Doe and Ms. Deblois, including social security and retirement calculations

k. Documentation from the other four Department of Corrections (DOC) employees who were hired-into-range between 2002-2004

l. Personnel File of Lisa Deblois

m. Reclassification documents of all Business Manager's A statewide.

m. Vermont Transparency Website Data - www.vttransparency.org

Acronym KEY

AHS	Agency of Human Services
DHR	The Department of Human Resources within the Agency of Human Services - the hiring authority which gives the final hiring approval to the appointing authority.
ASCIII	Administrative Services Coordinator III (Ms. Deblois & Mr. Doe were reclassified as ASCIII's from **Business Manager A's**).
CBA	Collective Bargaining Agreement
DOC	Department of Corrections-the appointing authority that proposed the hiring of Mr. Doe to DHR.
EPA	Equal Pay Act
FSS	Food Service Supervisor (the job Mr. Doe was hired-into-range to perform).

MVRCF	Marble Valley Regional Correctional Facility (where Lynne Silloway works).
NSCF	Northern State Correctional Facility (where Ms. Deblois has worked since 2006).
SSCF	Southern State Correctional Facility (Where Mr. Doe has worked since 2003 as a FSS and as Business Manager A/ASCIII).
PG	Pay Grade
VLRB	Vermont Labor Relations Board
VSEA	Vermont State Employees Association
VFEPA	Vermont Fair Employment Practices Act

ORGANIZATION OF INVESTIGATIVE REPORT

Part I of this report sets forth the framework of Ms. Deblois's complaint. It reviews the elements of the prima facie case and the available defenses to an equal pay claim. It discusses the respondent's legal burden when defending an Equal Pay Act violation, a brief history of the federal Equal Pay Act and it compares and contrasts Vermont's version with its federal predecessor.

Part II evaluates the State's initial defense to Ms. Deblois's claim – that is that she cannot make a prima facie case and should not be allowed to pursue her claim. Inspection of State documents and interviews with the complainant and other parties show the State's assertion to be without merit.

Part III reviews the State's first set of defenses, that is, that their "merit/seniority/collective bargaining" defenses. It should be noted that collective bargaining is not a recognized EPA defense but it will be considered nonetheless since the State may be seeking to tie it to the merit defense and/or seniority defense(s). This report finds all of these defenses inapplicable and without legitimate basis.

Part IV reviews the "any factor other than sex" defense factually and legally. The State claims that Mr. Doe legitimately makes more than Ms. Deblois because he was properly hired into state service through use of a personnel policy which allowed him to be hired at a greater rate of pay than is usual for a new state employee. Again, based on the State's own records and interviews with critical decision-makers, this investigation finds this defense to be flawed and without merit.

Part V concludes with a summary of findings and is followed by a preliminary recommendation that the Human Rights Commission find reasonable grounds to believe that the Respondents have violated and

continue to violate the VFEPA's equal pay provision with the issuance of each new paycheck Ms. Deblois (and her comparators) receive.[3]

I. EQUAL PAY-ESTABLISHING A PRIMA FACIE CASE

To establish a prima facie case of discrimination pursuant to the equal pay section of the Vermont Fair Employment Practices Act, 9 V.S.A. §495(a)(8), Ms. Deblois must show by a preponderance of the evidence (i.e. that it is more likely than not) that:

1. The employer pays different wages to employees of the opposite sex; **(Mr. Doe makes approximately $10,200 more than Ms. Deblois so this element is met)**.

2. The employees perform equal work on jobs requiring equal skill, effort, and responsibility; **(the Respondents deny this element)**; and,

3. The jobs are performed under similar working conditions. **(The Respondents deny this element)**.

Once Ms. Deblois establishes a prima facie case, the Respondent may assert one or more of the following affirmative defenses in an attempt to justify the wage differential:

1. A seniority system;
2. A merit system;
3. A system which measures earnings by quantity or quality of production; or

[3] Public Law No. 111-2, 123 Stat. 5 (2009). The Lilly Ledbetter Fair Pay Act of 2009 amended (42 U.S.C. 2000e–5(e)) known as "Title VII by adding the following language (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, **including each time wages, benefits, or other compensation is paid**, resulting in whole or in part from such a decision or other practice."

4. A differential based on any other factor other than sex.[4]

Ms. Deblois need not show intentional discrimination – only the elements outlined in the prima facie case since the EPA is a "strict liability"[5] statute. As a strict liability statute, the employer's burden is a "heavy" one[6] and an employer asserting any one or more of the four defenses must produce evidence *and* prove that this evidence establishes one or more of the four defenses.[7]

Ms. Deblois's complaint alleges that the Respondents failed to follow a specific state hiring policy when they petitioned for and approved the hire of her comparator, Mr. Doe, in 2003. She alleges that the unjustified and extraordinarily high starting wage he received at the time he was hired compounded over time so that when they both became Business Manager's A in 2006– his wage unlawfully exceeded hers in violation of VFEPA. Since there is no Vermont state case law on point to provide relevant statutory interpretation, this investigation turned for guidance to the federal Equal Pay Act as it has been interpreted by the Court of Appeals for the Second Circuit[8] as well as the United States Supreme Court.[9]

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[4] See 9 V.S.A. §495(a)(8)(A)(i)-(iv) and 29 U.S.C. § 206(d)(1)(1982).
[5] Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135, 142 (2nd Cir. 2000).
[6] Timmer v. Michigan Dep't. of Commerce, 104 F.3d 833, 843 (6th Cir. 1997).
[7] Strict products liability, statutory rape and dog bite laws are some example where the element of intent need not be shown.
[8] The Second Circuit covers New York, Vermont and Connecticut and is therefore the controlling authority for Vermont.
[9] Lavalley V. E.B. & A.C. Whiting Company, 166 Vt. 205 (1997). The Vermont Supreme Court has "look[ed] to federal case law for guidance in construing identical provisions of two statutes." Lavalley at 210. See also Hogdon v. Mt. Mansfield Co., Inc., 160 Vt. 150, 165 (1993). The Vermont Supreme Court has not been presented with an equal pay case of this nature. As noted in the first section, Vermont must look to the federal EPA for interpretation since there is no Vermont case on point. This investigation researched the legislative history and it is essentially silent about lawmaker intent with respect to the four defenses. There were approximately two hours of unintelligible recorded committee testimony concerning the passage of equal pay provisions of the VFEPA so there was no guidance regarding passage of the law generally or the exceptions in particular.

The Federal Equal Pay Act is a "remedial statute"[10] and must be read broadly in order to achieve its intended purpose – that is, ending wage disparities between men and women when they perform the same or similar work. In *Corning Glass Works v. Brennan*, the United States Supreme Court discussed the purposes behind the passage of the EPA:

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination . . . that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the [plaintiff] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[11]

While the language of Vermont's Equal Pay Act is modeled on the federal Equal Pay Act, it carries more severe monetary penalties than its federal counterpart by allowing for the recovery of double lost wages.[12] Vermont also allows for investigations to be conducted in-state by the Attorney General's Office[13] and for an action to be brought by an aggrieved employee no matter how small the business.[14] A separate subsection ensures that employees can speak openly about their wages without fear of

[10] "Remedial" statues are to be interpreted broadly since their purpose is to right past wrongs, so to speak. See generally Black's Law Dictionary under "Remedial Laws or Statutes."
[11] 417 U.S. 188, 195 (1974).
[12] 21 V.S.A. §495b(c).
[13] 21 V.S.A. § 495b(a).
[14] Id.

punitive action[15] which creates an opportunity for employees to learn what their co-workers make without fear of negative employment consequences.

II. STATE ASSERTS A LACK OF A PRIMA FACIE CASE

On July 10, 2012 the State submitted its defenses to Ms. Deblois's complaint. With respect to the prima facie case, the State asserted the following:

> 1. The two employees at issue, Mr. Doe and the Complainant, do not perform equal work on jobs requiring equal skill, effort, and responsibility.
>
> 2. Mr. Doe and the Complainant do not perform their jobs under similar working conditions.

In order to determine the validity of the State's superficially asserted[16] defenses, this investigation looked for guidance to legislative history, the EEOC Compliance Manual, the Code of Federal Regulations, relevant case law, and at the State's own personnel records. In addition, this report interviewed retired Superintendent Anita Carbonell who had a thirty (30) year career in the Department of Corrections. She directly supervised Mr. Doe, Ms. Silloway and another ASCIII, I.B., as Business Manager's A at three different facilities and participated in the reclassification process to change their pay grade and title from Business Manager A at PG 21, to Administrative Services Coordinator III at PG 23. Reclassification records of the other five ASCIII's aggrieved by the unequal pay were reviewed:

- Lynne Silloway- Marble Valley Regional Correctional Facility, (MVRCF) – hired **2002.**
- P.J. - Northeastern State Correctional Facility (NERCF) in St. Johnsbury and was hired in August of **1982**.

[15] 21 V.S.A. §495(a)(8)(B).
[16] No substantive reasons for these defenses were provided as has been noted.

- B.G., - Northwest State Correctional Facility (NWSCF) in Swanton and was hired in September of **1974**.
- H.T. - at Chittenden Regional Correctional Facility (CRCF) and was hired in **2002**. However H.T. resigned her position in 2012.
- I.B. – Southeastern State Correctional Facility (SESCF) hired in **1998**.

Since the Equal Pay Act is a "broadly remedial" statute, it cannot have been intended to make it painstakingly difficult for a complainant to make out a prima facie case, which is what the State apparently seeks to do. The goal of the statute is to address and redress the sources of past pay inequities. If the drafters of the Equal Pay Act had intended to make it incredibly difficult for complainants to make out a prima facie case, then the central issue the statute targeted – wage disparity - could not be so readily exposed and the statutory language would have reflected a higher evidentiary hurdle for complainants. However strict liability statutes place the greatest burden upon respondents in defending a claim, not the complainant/employee since the nature of the statute obviates the element of intent.

The EEOC Compliance Manual[17] sets forth a number of helpful tests for determining whether a prima facie case exists. The overall question is whether the jobs are "substantially equal." In making that determination, an inquiry into the *actual* duties of the proposed comparators is key to determining whether they perform a "common core of tasks." While job titles and classifications are not dispositive, they are one factor to consider. If it is determined that there is a common core of tasks, the inquiry can be further refined to consider whether "in terms of overall job content, the jobs require substantially equal skill, effort, and responsibility and whether the

[17] See http://www.eeoc.gov/policy/docs/compensation.html for the online EEOC Compliance Manual, Section 10: Compensation Discrimination, subsection 10-IV - COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT.

working conditions are similar."[18] These three categories are defined in the Compliance Manual as follows:[19]

> **a. <u>Skill</u> -**experience, ability, education, and training required are substantially the same for each job;
>
> **b. <u>Effort</u> -Effort is the amount of physical or mental exertion needed to perform a job.** Job factors that cause physical or mental fatigue or stress are to be considered in determining the effort required for a job. Differences in the *kind* of effort exerted do not justify a compensation differential if the *amount* of effort is substantially the same.
>
> c. **<u>Responsibility</u> - Responsibility is the degree of accountability required in performing a job.** Factors to be considered in determining the level of responsibility in a job include:
>
> - the extent to which the employee works without supervision;
> - the extent to which the employee exercises supervisory functions; and,
> - the impact of the employee's exercise of his or her job functions on the employer's business.
>
> **Moreover, the mere fact that an employee has assistants does not necessarily demonstrate that he or she has a more responsible position than one who does not have assistants.
>
> **If one employee in a group performing otherwise equal jobs is given a different task that requires a significant degree of responsibility, then the level of responsibility in that person's job is not equal to the others.
>
> **d. <u>Working Conditions</u> - Working conditions consist of two factors:**
>
> - **Surroundings -** Surroundings take into account the intensity and frequency of environmental elements encountered in the job, such as heat, cold, wetness, noise, fumes, odors, dust, and ventilation.
> - **Hazards -**Hazards take into account the number and frequency of physical hazards and the severity of injury they can cause.

A claim of a prima facie case can only be defeated if there are extra duties which would make the work of one comparator *substantially different* than the work of the other comparators. However jobs with the same

[18] <u>Id</u>. (emphasis added).
[19] <u>Id</u>.

common core of tasks can be equal even though the comparators perform extra duties if the extra duties are not substantially different. In sum, if a common core of tasks exists, then the jobs are substantially equal and a prima facie case is established.

a. Reclassification of Business Manager's A to Administrative Service Coordinator's III

Several sources of information provided convincing proof to this investigation that Ms. Deblois can establish a prima facie case of equal pay discrimination under VFEPA. The most convincing proof came from the State's own records. This investigation requested and received the personnel files of Ms. Deblois, Mr. Doe and other ASCIII's cited above, however Mr. Doe's file was heavily redacted and essentially useless. This investigation also reviewed the records of the 2006-2008 statewide reclassification process of all Business Manager's A. At that time, Ms. Deblois and Mr. Doe were both Business Manager's A and each was assigned to their own correctional facility – Ms. Deblois to NSCF and Mr. Doe to SSCF.

The reclassification effort was the best objective source for reviewing the skills, effort, responsibilities and working conditions (cited above by the EEOC Compliance Manual) of Ms. Deblois and Mr. Doe and the other ASCIII's.[20] It required both DOC and DHR to consider the proposed new positions for the Business Manager's A, their assigned duties and working conditions very carefully, both initially in defining the positions in great detail and during the review process and in making the final pay grade, job duties and title determination.

The state of Vermont uses the Willis Point Factor System to make reclassification decisions. The State's Human Resources website describes the Willis system in this way:

[20] See notes 17-21 above.

> Willis is a point factor system that the State of Vermont has used since 1986. Willis evaluates duties assigned to the position on the basis of the highest skill or most challenging level required as a normal part of the job. The evaluation is based upon the job functions not the person or job title. The Willis evaluation components are: Knowledge & Skills; Mental Demands; Accountability; and Working Condition. Each of the four components has an additional two or three dimensions.[21]

The guide itself is twenty-six (26) pages in length but the critical aspects of how the system is used to evaluate job classes are set forth in Part II of the guide.[22] This highly specific and systematic approach teases out dissimilar job classes and allows for new ones to be created only if the knowledge, skill sets, mental demands, accountability and working conditions are consistent.[23] State records showed that in 2006 when the reclassification effort commenced, DOC had eleven (11) Business Manager's A assigned to all the then existing[24] correctional facilities. Two other DOC Business Manager's A were assigned to probation and parole.[25]

The reclassification records were persuasive evidence of a prima facie case for the following reasons:

- The reclassification was initiated by DHR as part of a statewide financial review. This demonstrated an in-depth understanding of the nature of the job and the need to adjust the objectives of the position based on functions within agencies and departments and other correctional facilities.

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[21] http://humanresources.vermont.gov/services/classification/process_employees
[22] Id.
[23] The language used by Willis tracks the EEOC Compliance Manual guidelines, and the method used would suggest that the employer wishes to use a system of reclassification that prevents pay inequities. However the reason for this particular pay inequity of course predated the reclassification and had to do with hiring rather than reclassification once hired.
[24] At the time the Dale Correctional Facility was still operational with its own separate business managers. While Woodstock Correctional Facility had closed, NESCF was divided into a work camp and a detainment facility with two separate business managers, three of which overlapped. Ultimately the work camp and facility became one unit, under one Business Manager A – P.J. who is still there as an ASCIII.
[25] These Business Manager's A were reclassified and got only a new job title – Administrative Services Coordinator I – but they stayed at PG 21.

- DOC Central Office actually wrote the request for classification for all the Business Manager's A assigned to the various correctional facilities. This meant the reclassification request was by "management" and not an "employee(s)" request. This demonstrated that DOC saw the Business Manager A's job at each correctional facility as comparable positions.

- Furthermore:

    - All the requests were written uniformly in terms of content and order which again showed that that DOC saw the jobs as comparable positions.

    - While DOC personalized each reclassification request to reflect distinguishing items such as the number of people supervised and difference in facility budget, otherwise, the reclassification requests were essentially the same for each Business Manager A.

    - Most importantly, regardless of individual facility budget size or number of personnel supervised, DOC still saw all the facility Business Manager A positions as having a common core of tasks since the same pay grade and job title was requested for each.

    - The detail contained in the requests showed that <u>all</u> facility Business Manager's A performed the same major job duties, such as payroll, budget, contracts, purchasing, supervision of personnel and supervision of inmate accounts. Furthermore, all applicable audit processes (budget etc.) were identical in each facility.

    - In addition, DOC represented that all facility Business Manager's A were exposed to the same hazards such as "physical/sexual harm from unpredictable inmate population" and "Exposure to blood-borne diseases such as HIV, Hepatitis and other pathogens." This completely distinguished them from any other Business Manager A not only throughout the state, but also including the DOC Business Manager's A in probation and parole.[26]

[26] For instance the two Business Manager's A in the Parole & Probation Department did not have hazards of this type.

- All facility Business Manager's A were required to meet the same licensing, registration and certification requirements whereas other Business Manager's A in other agencies or departments had different requirements.[27] There was more emphasis on what an ASCIII needed on the job to maintain training and certification than what the person had to have to get the job.

- The chain of command for all the facility Business Manager's A was the same. All facility Business Manager's A had staff that reported to them. The Business Manager A reported directly to the Superintendents of their respective facility. Those Superintendents all reported to the Director of Facilities who reported to the Assistant Superintendent or Superintendent, so there was (and still is) an identical chain of command.[28]

- Once the requests were submitted, DHR initially failed to assign pay grade 23. At that point all of the Business Manager's A at each facility appealed this decision and received support from DOC in their appeal.

- As a result, DHR then proposed to upgrade the Business Manager's A to ASCIII's, pay grade 23. This was irrespective of size of facility, size of budget, number of people supervised – all factors that DHR was clearly aware of.

- Furthermore, before DHR made the final decision to upgrade to PG 23, records show that an email was sent to DOC to give them time to "disagree" and respond. On August 20, 2008, an email from DOC to DHR directed DHR to go ahead with the upgrade.

[27] The Business Manager A job description in the Department of Motor Vehicles was broad and more vague, citing requirements such as "Bachelor's degree, three years' experience" and computer skills etc.
[28] This investigation obtained a copy of the FY 2013 DOC Organization Chart showing the chain of command structure which covers about 31 pages.

- Outside of the DOC Business Manager's A, the statewide reclassification of other Business Manager's A, even within the same Department or Agency yielded inconsistent results.[29]

- Inside of DOC, two Business Manager's A located in the office of Probation & Parole remained at the same pay grade (21) after the reclassification with only a change in title to Administrative Service Coordinator I (ASCI). They clearly had a different core of duties than the ASCIII's.

Currently, the ASCIII's within DOC continue to be treated as professional equals (and thus comparators for purpose of the prima facie case analysis). This investigation obtained copies of meeting minutes of all facility ASCIII's held at Central Office, as well as some emails from Central Office which show higher management making requests for ASCIII's to assist each other. This shows a common core of tasks in perception and reality. All ASCIII's attend the same trainings in Payroll, at Business Manager Meetings in Williston and elsewhere to ensure consistency with Financial Directives & Procedures. They are trained as a group by DHR in personnel issues such as FMLA (Family Medical Leave Act), the new payroll system and other financial systems such as dealing with inmate monies. They participate in the hiring process. They are collectively addressed with an email alias – "AHS - DOC - Business Managers"- which demonstrates that top management at DOC considers them to be a collective professional group with a congruency of issues. Major issues relevant to one ASCIII are relevant to all ASCIII's.

If there had been any *substantially dissimilar* differences in job requirements, settings or duties that distinguished one DOC Business Manager A from another, the DOC group, which included Ms. Deblois and Mr. Doe, would not have been reclassified to the same pay grade, job

[29] While there were four Business Manager's A within the Agency of Transportation, none of them were reclassified as ASCIII's and only one was classified to PG 23 with the title of Financial Administrator II. Two other Business Manager's A became Administrative Service Coordinator's II at PG 21 and a Financial Administrator I at PG 22.

description and title. Indeed it would have been at this critical point that they could have been variously reclassified – one as an ASCI, another as an ASCIII, ASCIV or ASCII and so on with different pay grades to match. The organizational chart would have been adjusted to show them falling into different places within it.

In sum, Ms. Deblois can establish a prima facie case pursuant to VFEPA. The State's own evidence clearly shows that both DOC and DHR believed that all the DOC facility-assigned Business Manager's A had the "same common core of tasks" and reclassified them all as a result. This determination was made over a period of approximately two years and was an involved and thorough evaluation of each individual position which identified the overall core similarities of all of the DOC facility-assigned Business Manager's A. The fact that one facility might house more inmates than another, that one budget might be greater than another facility's budget, that one ASCIII might supervise more staff than another ASCIII, ultimately did not matter in the reclassification decision jointly made by DOC and DHR with knowledge of AoA and AHS. In making this determination, all aspects of skill sets, effort, responsibility, and working conditions were considered as set forth by the EEOC guidelines.

b. Interview with Anita Carbonell

Ms. Carbonell worked for the DOC over a thirty (30) year period until she retired in 2011. In 2006, while Superintendent of Marble Valley Correctional Facility[30] (MVRCF), Ms. Carbonell hired and supervised Lynne Silloway for three years as a Business Manager A. She then moved to Southeast State Correctional Facility (SESCF) where she supervised I.B. as a Business Manager A for approximately two and a half years. After leaving Southeast State, she became Superintendent at Southern State Correctional Facility (SSCF) and supervised Mr. Doe as a Business Manager A until her

[30] Ms. Carbonell was Superintendent at MVRCF from August 2003 - July 2006.

retirement on March 31, 2011. All three of these Business Manager's A/ASCIII's reported directly to her and she considered them to be part of the "executive team." As a result of this close working relationship, she had in-depth knowledge of the nature of the position, the duties attached the position and how the persons in the positions interacted with each other between facilities to assist, train, provide coverage and ensure the necessary compliance and conformity at their respective facilities.

As a Superintendent, Ms. Carbonell reported to the Director of Facilities (there were three during her tenure as Superintendent). She stated that the Director of Facilities reported directly to the Commissioner of DOC or through the Deputy Commissioner of DOC. At that time, Central Office was located in Waterbury[31] and the departmental business manager (now called the "Financial Director" and currently held by Sarah Clark) was situated there. She confirmed that all ASCIII's reported to Central Office for Business Manager meetings as noted above.

This investigation reviewed a list of identified core duties performed by the ASCIII's with Ms. Carbonell. She confirmed that those core duties were duties the Business Manager's A/ASCIII's performed based on her experience with I.B., Mr. Doe and Ms. Silloway. She emphasized the departmental expectation that the Business Manager's A work individually and collectively to assist and train each other due to the need for consistency in all of the facilities, particularly with respect to financial functions. She stated she had observed ASCIII's working together cooperatively during her supervision of them. She stated that ASCIII's should be able to move between facilities since the work involved the same core set of tasks.

She pointed out that DOC audits all financial functions at each facility using the same software and procedures. She stated that the scales between

[31] After Tropical Storm Irene it moved to Williston.

facilities are relative from the point of view of the ASCIII and affects their particular job only in whether their software "crunch(es)" numbers with an extra '0' at the end of it. If one facility does more sentence computations an administrative staff is assigned to that function - the ASCIII does not do it. In her opinion, an ASCIII who has to do an extra staff evaluation as compared to another does not make the job substantially different since it does not change the fundamental nature of the job or the common core of tasks. It does not affect the skill required, the working conditions and the level of responsibility. In sum, based on her experience at three different facilities of different sizes and budgets, she believes that the ASCIII position is essentially fungible in nature, thus making all ASCIII's proper comparators. The reclassification process bore out the information she provided.

Ms. Carbonell was asked if she had authorized or asked for a new employee to be hire-into-range for any position. She did not recall asking for or authorizing a hire-into-range even though she had done a substantial amount of hiring. She stated that based on her experience with hiring, Mr. Doe's hire would not have been in keeping with her understanding of general DOC policy and she was not aware of a hire-into-range in a "field level" position.[32]

III. THE STATE'S FIRST SET OF DEFENSES: MERIT/SENIORITY/COLLECTIVE BARGAINING DEFENSE

This investigation now moves to the State's assertions that the wage differential is the product of gender neutral, merit and/or seniority based classification system created by statute and collective bargaining. These defenses are without basis and can be summarily dismissed. The four VFEPA defenses include a merit defense and a seniority defense however Mr. Doe

[32] Meaning not in Central Office – i.e. it would be unheard of even to hire a Business Manager A into range even if they were part of the executive staff.

qualifies for neither. Merit – as it is defined in VFEPA and the EEOC Compliance Manual– occurs when an employee has been on the job in a particular position and is awarded for performance while in that job.[33] However in this case, the wage disparity was created by the respondents on the date Mr. Doe was hired in 2003 and carried forward into his position as a Business Manager A/ASCIII. Therefore, merit does not apply.

The State's argument with respect to collective bargaining is peculiar given that it is not VFEPA defense. However the State may be making an effort to define the 8% increase he received when he became a Business Manager A as "merit." However the 8% increase was due to a provision in the CBA which awarded this increase to all first time supervisors – not just Mr. Doe and the State's records show that even without the 8% increase, Mr. Doe still made more than Ms. Deblois and Ms. Deblois also received the 8% increase in October 2006.[34] Thus, attempting to tie the 8% increase to merit pay or making it into a kind of stand-alone merit pay does not work. Additionally, while the union contract also contains the hire-into-range provision,[35] unions are not exempt from adherence to the federal[36] or state[37] equal pay acts and a collective bargaining agreement cannot trump the mandate of equal pay for equal work.[38]

The seniority defense does not apply either, in spite of the fact that Mr. Doe was hired in 2003 before Ms. Deblois was hired in 2005. The EEOC Compliance Manual states:

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[33] See the online EEOC Compliance Manual, Section 10: Compensation Discrimination, subsection 10-IV - COMPENSATION DISCRIMINATION IN VIOLATION OF THE EQUAL PAY ACT. http://www.eeoc.gov/policy/docs/compensation.html

[34] The 8% bump raised his salary from $24.42 to $25.10.

[35] Currently Article 45, §14(a) of the Non-Management Collective Bargaining Agreement and Article 50 § 14(a) of the Corrections Contract.

[36] 29 U.S.C. §206(d).

[37] 21 V.S.A. §495(a)(8).

[38] See generally Gibbs-Alfano v. Burton, 281 F.3d 12, 21-22 (C.A.2 N.Y. 2002); See also Hodgson v. Sanger, 326 F. Supp. 371, 373 (D.C. Md. 1971) ("There is no apparent reason why a union which violates Section 206(d) [of the EPA] should be treated any differently from an employer violator.").

> A seniority system rewards employees according to the length of their employment…. To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.[39]

The Manual further defines the requirement of a valid seniority system:

> "A seniority, merit, or incentive system must be bona fide to operate as an EPA defense. This means it:
>
> - was not adopted with discriminatory intent;
> - is an established system containing predetermined criteria for measuring seniority, merit, or productivity;
> - has been communicated to employees;
> - has been consistently and even-handedly applied to employees of both sexes; and
> - is in fact the basis for the compensation differential

In order for a $10,200 difference to be a valid seniority based wage difference, all the above elements would have to be met. However since the reason for the significant pay disparity is the improper hire of Mr. Doe in a manner inconsistent with §12.2, there is no way for the State to claim that the wage difference is based on seniority - it is not. The scale of the disparity and the basis for it effectively destroys any argument for a valid seniority system defense.

For instance, Ms. Silloway was hired in 2002, three years before Ms. Deblois and one year before Mr. Doe. However as of June 14, 2012,[40] there was no actual difference in base pay between Ms. Silloway and Ms. Deblois. During that pay period, Ms. Deblois's earned $1875.20 and so did Ms. Silloway even though she has three years of seniority over Ms. Deblois.[41] However Mr. Doe's salary was $2251.20 - more than Ms. Silloway who is more senior to him and more than Ms. Deblois who is less senior to him. The

[39] See supra note 30.
[40] This date is used because it is after the reasonable grounds finding in the Silloway case.
[41] Part of the reason for this lies in Ms. Deblois's 8% first-time-supervisor increase.

reason for the difference is clearly not due to seniority but due to his being hired-into-range. Thus, the State cannot claim the difference between Mr. Doe and Ms. Deblois as a valid example of a bona fide seniority system.

IV. THE "ANY FACTOR OTHER THAN SEX" DEFENSE

The state asserts that Mr. Doe was hired pursuant to a state personnel policy, §12.2 – the "hire-into-range" policy. (**Attachment 1**). This is accurate: Mr. Doe was hired pursuant to state personnel policy §12.2 which is still in the policy manual today. The State also asserts that DOC and DHR properly followed this policy and that the hiring of Mr. Doe did not contribute to the unlawful pay disparity with Ms. Deblois and that it qualifies as an "any factor other than sex" defense. This is inaccurate: the State failed to follow the policy when it hired Mr. Doe and this failure led to the current equal pay violation. Thus, it does not qualify as the "any factor other than sex" defense. It is the State's burden to produce proof which legitimates the defense and to persuade the finder of fact that the proof offered is valid. The State cannot carry this burden.

Section 12.2 contains a system of checks and balances: DOC as the appointing authority must provide very specific information to DHR – the hiring authority - so that DHR can review the proposed hire to see if it is appropriate and necessary. In addition to reviewing DOC's information, §12.2 requires DHR to generate its own set of data to evaluate the legitimacy of the hiring request independent of DOC's representations. Thus, the structure of §12.2 is embedded with preventatives – that is – it requires information gathering by appointing and hiring authorities in order to ensure that laws such as equal pay are not violated. However when the policy is not followed, as it was not in Mr. Doe's case, a host of problems arise. In this case, hiring Mr. Doe violated VFEPA's equal pay provision both immediately and prospectively.

This investigation determined that DOC and DHR failed to follow § 12.2 by inspecting subpoenaed State records and through interviews with the key appointing and hiring authorities involved in hiring of Mr. Doe. Hiring a new employee contrary to the customary payment plan at a higher-than-normal salary can create significant workplace complications, not the least of which may be equal pay problems between male and female workers. Section §12.2 clearly states that "The Department of Personnel (DHR) has the responsibility to ensure appointing authorities (DOC) maintain practices that preserve internal equity and adhere to the principles of the classified pay plan."[42] Interestingly, there was enough awareness about pay disparities resulting from the hire-into-range policy that the CBA contains a "fix" [43] for possible problems. In correspondence with this investigation, General Counsel for DHR stated that use of this provision is rare at best and the "fix" is hard to assess due to the complications associated with step calculations and the like.[44] In any event, equal pay violations resulted both at the time Mr. Doe was hired as an FSS and later as a Business Manager A and a comparator to Ms. Deblois, thus the "any factor other than sex" does not apply.

a. The State Pay System

A brief overview of the state pay system is necessary to understand how Ms. Deblois ended up being paid less than Mr. Doe. In September of 2003, when Mr. Doe was hired, there were thirty-two (32)[45] pay grades with

[42] See §12.2.
[43] The VSEA SUPERVISORY BARGAINING AGREEMENT states: "[the] Commissioner of Human Resources may raise the rate of current employees in that department in the same class and/or associated class to the rate of the newly hired employee. Employees so raised shall retain their old step date and time already accrued toward his/her next step movement. VSEA SUPERVISORY BARGAINING UNIT AGREEMENT EFFECTIVE JULY 1, 2010 — EXPIRING JUNE 30, 2012 - Article 49, §15(a) – Salaries and Wages.
[44] Letter from General Counsel Steve Collier to Investigator Nelson Campbell, dated November 4, 2011.
[45] POLICIES AND PROCEDURES MANUAL §12.1. The manual says there are 28, but the current pay chart reflects 32 pay grades.

minimum and maximum pay rates established for each pay grade.[46] The pay rates within the particular pay grade are assigned a "step" and all pay grades contain fifteen (15) steps.[47] Typically, a new employee starts at step 1 for a period of six months. At the end of this successful probation the employee moves to step 2. An employee receives an annual one step increase until he/she reaches step 6.

At steps 6-12, an employee must wait two years between each step increase. At steps 13-15 an employee must wait 3 years for the next step increase to take effect. Thus, if an employee were to stay within one pay grade throughout his or her career, and have satisfactory job performance, it would take approximately twenty-four and half years to reach step 15.[48] When Mr. Doe was hired at step 13, DOC and DHR essentially gave him salary that could take a state employee (using the assumptions just set forth) approximately 18.5 years to achieve.[49]

An employee's pay grade can also increase if he/she is promoted or reclassified. When this occurs, the employee does not start at step 1 in the new pay grade. Instead, the employee takes the rate of pay s/he had at the then current step to the new position. A complex provision from the

[46] Id. at §6.0
[47] See §12.1.
[48] Variations can occur via cost-of-living increases, changes in the amount each step pays based on legislative action such as step increase freezes, or faster step movement based on merit and/or the union contract. However once step15 is reached within any pay grade, an employee would have to move to a higher pay grade for significant increases in salary.
[49] Step acceleration can also occur, for instance, if an employee advances their education. VSEA SUPERVISORY BARGAINING UNIT AGREEMENT EFFECTIVE JULY 1, 2010 — EXPIRING JUNE 30, 2012, Article 81 - Accelerated Step Advancement Program.

bargaining contract provides the calculation performed by personnel to set the new step when a higher pay grade is achieved.[50] Usually, the step is adjusted down one or two steps. Thus, each time Mr. Doe moved to a new pay grade, his pay reflected the financial advantage attached to the step he was originally hired into - the higher the original step the greater the new rate of pay. [51] This is the framework that reflected the pay inequity with Ms. Deblois. Supervisory employees may utilize a step acceleration program through a provision of the CBA to increase their step, but not their pay grade.[52]

b) DOC and the DHR hire Mr. Doe into-range

In September 2003, Mr. Doe, an external applicant, was hired as a "Facility Food Services Supervisor," PG 18 step 13 at the then newly constructed Southern State Correctional Facility (SSCF) in Springfield, Vermont. (**Attachment 2**).In spite of his title he was not actually classified as a "supervisor" pursuant to the collective bargaining agreement. As noted, Step 1 is the "normal hiring rate established for most positions and is the salary usually offered to applicants when they apply for positions in State Government."[53] Chart A shows the difference in pay between an employee typically hired at PG 18 step 1 and Mr. Doe who was hired at PG 18 step 13:

[50] VSEA CORRECTIONS BARGAINING AGREEMENT-ARTICLE 50 (SALARIES AND WAGES) §9: "…upon promotion, upward reallocation or reassignment of a position to a higher pay grade, an employee covered by this Agreement shall receive a salary increase by being slotted onto that step of the new pay grade which would reflect an increase of at least five percent (5%) over the salary rate prior to promotion (i.e., five percent (5%) is the lowest amount an employee will receive, and the maximum amount would be governed according to placement on a step which might be higher than, but nearest to, the five percent (5%) minimum specified). The rate of five percent (5%) as outlined above shall be eight percent (8%) if the employee is moving upwards three (3) or more pay grades."

[51] This investigation reviewed 974 entries from State documents of men and women who were promoted three or more pay grades to see what whether their pre and post step movement appeared gender based. This investigation could find no significant anomalies in the material provided.

[52] Accelerated Step Advancement Program – Article 81 Supervisory Bargaining Unit.

[53] See §12.2.

CHART A

Difference in salary using 2003-2004 pay chart	
PG 18 Step 1	**PG 18, Step 13** ***(Mr. Doe)***
$13.65/hr.	$19.94/hr. ***(Mr. Doe)***
$28,392.00/yr.	$41,475.20/yr.
	$13,083.20 difference in pay plus retirement benefits

It should be noted that the State's records show a female FSS was hired the year before Mr. Doe at a pay grade 18, step 1. Additionally, his salary resulted in his making more than another female FSS with thirteen (13) years of seniority and more experience as an FSS. Chart B illustrates these differences:

CHART B

	Female FSS hired in 1988	**Female FSS hired in 2002**	**Mr. Doe Male FSS hired in 2003**
Year of hire	**1988**	**2002**	**2003**
PG and Step as of September 2003	PG 18, Step 11 (hiring step not provided by State)	PG 18, Step 3 (hired at Step 1 at $28,392.00/yr. and $13.65 an hour)	PG 18, Step 13 at hire
Hourly/Yearly	**$18.89** **$ 39,291.20**	**$14.76** **$30,700.80**	**$19.94** **$41,475.20**
			difference in pay not including retirement and FICA

Mr. Doe worked as a Food Services Supervisor until 2004 when he requested and received a reclassification to a higher pay grade. As a result, his overall salary increased again but was much higher than it would have been had he not originally been hired-into-range at step 13.[54]

In September of 2006, Mr. Doe received his first pay check as a Business Manager A. Ms. Deblois received hers on the 26th of October. Chart C reflects the hourly difference in wages on October 26, 2006.

CHART C

	Hourly wage at time both Mr. Doe and Ms. Deblois first became Business Manager's A
Ms. Deblois	**$18.48**
Mr. Doe	**$25.10**

This investigation asked the State to release records for intra-departmental hire-into-range numbers from 2000-2010 for any hires at step 10 and above. These records showed that during that period, Mr. Doe was the single hire-into-range at or above a step 10 by DOC. This investigation is aware that DOC hired four other employees into-range in the same time period as Mr. Doe from 2002-2004. However those new employees were hired into newly created, unique positions and none was hired above a step 8.[55] In general, the figures between 2000-2010 show that hires-into-range were for highly specialized positions such as State Veterinarian (PG 27, step 13, male), Chief, Special Audits and Reviews (PG 27, step 10, one male, one

[54] In 2004 Mr. Doe asked to be reclassified. His request for reclassification was granted and he became a Facility Food Services Supervisor II. As a result, within one year of being hired, his pay grade went from 18 to 20. His step was adjusted to a step 11 and his hourly wage went from $19.94 to $21.56.

[55] This investigation subpoenaed the files of other DOC employees hired into range from 2002-2004 for comparison.

female), Market & Insurance Analyst (PG 23, step 12, two males), and Deputy Medical Examiner (PG 29, step 15, male).[56]

This investigation then compared the hire-into-range requirements of §12.2 with the practices used when Mr. Doe was actually hired. Mr. Doe's hiring file showed that DOC (the appointing authority) failed to supply specific information required by §12.2 to DHR (the hiring authority). Records and interviews also showed that DHR failed to ensure that DOC provided this information.

The following information that §12.2 required DOC to provide was missing or could not be produced by the State:

A. *Candidate and Job Information*:

1. There was no information on the qualifications of the staff serving in the same class as Mr. Doe; it appears that the impact on other Food Service Supervisors was not considered at all and it was considerable – **See Chart B above.**

2. There was no explanation of how the request to hire Mr. Doe into-range met the regulatory standards under which the salary exception could be granted (possibly because this was not the kind of position contemplated by the hire-into-range policy).

B. ***Hiring Process****:*

1. There was an incomplete summary of recruitment efforts; 3 V.S.A. §327(a) requires that "When a vacancy in the classified service occurs, the appointing officer [here DOC] shall make a diligent effort to recruit an employee from within the classified service to fill the vacancy."

2. A copy of the hiring certificate was missing- this document would have identified which candidates were external or internal (if any).

[56] There are some anomalous looking hires like Mr. Doe but they are few and would be interesting to examine to see why they occurred, for instance Sanitarian at PG 17 step 10, AOT Maintenance Worker IV (PG 15, step 10).

3. There appears to have been one internal applicant, however since the State could not produce the hiring certificate which would have identified that person, there was no way to know why that person did not qualify or who they were.

4. There was no information about turnover/vacancy data for the position class over the last two years.

C. ***Implications (of hiring Mr. Doe into range)***:

1. There was no list of other employees or classes that would potentially be affected by the hire-into-range request, i.e. other Food Service Supervisors or other future co-workers. **See Chart A-C above.**

2. There was no information regarding recent hires in the same or similar class and any other related factors.

In addition, DHR failed to produce evidence that it considered the factors required by §12.2, specifically:

1. There was no information on the recruitment and retention experience for the position.

2. There was no information on the salary market for the particular type of expertise.

3. The impact of the vacancy on program service.

4. There was no information about the impact on current incumbents with similar qualifications.

Furthermore, §12.2 prohibits DHR from approving a hire-into-range request unless:

1. There was a "shortage of qualified applicants for the position."

    - There were at least two other applicants with high rankings.
    - Furthermore, officials from DOC and DHR admitted during interviews that existing staff could have covered the facility until a permanent hire occurred – there was no "emergency."

2. The applicant had "special qualifications, training, or experience, that while not necessarily a requirement of the job, have some unique value to the organization."

    - DHR accepted DOC's superficial representations in this regard but was not able to produce evidence of research of its own.

3. That the "candidate possesses exceptional and outstanding qualifications that exceed those of other applicants and to such an extent that not hiring that particular employee will be detrimental to the State."

    - Again, the State has shown no convincing evidence, whatever, that this was the case with Mr. Doe and the position at hand.

Mr. Doe's position required no specialized skills and could have been performed by another existing FSS. When Mr. Doe was hired, there were five other Food Service Supervisors in existence, all of whom were PG 18. The position was non-unique, non-supervisory and required only a high school education or its equivalent. It might have been difficult to obtain information on the salary market, recruitment, retention and regulatory standards for a Food Service Supervisor since it was perhaps not the type of position suitable for a hire-into-range request. The State has produced no evidence to refute this. The difficulty of gathering the necessary information (had any effort been made) should have been a red flag for DHR.

This investigation obtained further information from the two individuals responsible for hiring Mr. Doe, Keith Tallon from DOC, and Molly Paulger from DHR.

c. Interview with the DOC Appointing Authority – Keith Tallon

The person responsible for requesting that Mr. Doe be hired was Keith Tallon who was the new superintendent[57] of SSCF in the fall of 2003. Mr. Tallon wrote the hire-into-range letter recommending that Mr. Doe be hired-

[57] Mr. Tallon was removed from this position in 2005.

into-range to Cynthia LaWare,[58] who was then the Commissioner of Personnel. The letter was then forwarded to Molly Paulger in the personnel division of DHR. Ms. Paulger was responsible for approving all hire-into-range requests from appointing authorities at that time.

Mr. Tallon was unable to recall whether the particular position of Food Services Supervisor was advertised and there was no evidence in the file or in the letter he wrote to DHR detailing how the position had been advertised which is information required by §12.2. Mr. Tallon stated he believed he would have had to discuss his hire-into-range request with his direct supervisor at the time, but the State produced no documentation that he did so. Mr. Tallon believed it was his first hire-into-range request. He stated that he consulted the personnel manual before he hired Mr. Doe and that he went "by the book" in hiring Mr. Doe. However the paper record (or lack of it) and his statements during the interview contradict this assertion.

During the interview, Mr. Tallon noted that two correctional facilities were in transition[59] during that period in 2003 and that employees at one of those facilities would have had the right-of-first-refusal for positions at SSCF.[60] Thus, the transitional status of these two institutions potentially held significant staffing implications for the SSCF hiring pool and would have required that Mr. Tallon pay special attention to internal candidates even beyond the requirements of §12.2 and the statutory mandate of 3 V.S.A. §327(a) which requires that the appointing authority (DOC), make a "diligent effort to recruit an employee from within the classified service to fill

[58] She is no longer with the state. There was a brief one page cover letter to Ms. LaWare from Steve Gold. The letter was signed by Sister Janice Ryan, then Deputy Commissioner of DOC, on his behalf. Mr. Gold was the Commissioner of Corrections and he is also no longer with the state. His cover letter refers Ms. LaWare to Mr. Tallon's "memo." Other than this cover memo from Sister Ryan/Mr. Gold, there is no other evidence of their, or Ms. LaWare's involvement.

[59] Woodstock Correctional Facility was closing down at the same time SSCF was opening and In addition, the prison in Windsor (SESCF) was being converted to an all-female facility so some male staff from that facility might have been seeking to transfer to other institutions.

[60] This investigation confirmed the accuracy of this statement with VSEA.

the vacancy." However Mr. Tallon's letter to Ms. LaWare merely mentioned one DOC candidate to Ms. LaWare, but provided no other information about the identity, sex or qualifications of that candidate. The scoring chart he sent to the DHR did not identify the internal candidate and the hiring certificate (which would have identified the internal candidate) could not be produced by the State. Mr. Tallon did not recall seeing the hiring certificate but thought there must have been one.

Mr. Tallon was "not 100% sure" whether he had interviewed Mr. Doe for the position, but he thought he probably had. He was certain however that he had spoken to Mr. Doe's references. He stated that he and Mr. Doe may have had general salary discussions such as "what are you making now" but could not recall any other conversation as to salary.[61] For such a vague recollection of Mr. Doe, Mr. Tallon made the statement that "nobody even came close" to Mr. Doe as a good candidate. However the chart that Mr. Tallon submitted to DHR showed that Mr. Doe had an overall score of 34 points, while two other interviewed candidates each scored 32.75.[62] Mr. Tallon could not recall who these candidates were.

Mr. Tallon stated he did not consider the impact of Mr. Doe's hire-into-range on future hires into the FSS position, or on existing Food Service Supervisors who held that position when Mr. Doe was hired. Again, **Chart B** above details the impact on this set of employees. Mr. Tallon stated it was necessary to hire Mr. Doe at step 13 due to the necessity of getting the kitchen at the new facility quickly up and running, getting the "offender"

[61] Mr. Doe, on the other hand, stated that Mr. Tallon did not interview him and that he therefore had no salary discussions with Mr. Tallon.

[62] One interviewee had four years of food service experience and an associate degree in computer technology. The reason given for his rejection was "not enough experience." The other candidate with 32.75 had seventeen years of food service experience, no college education and no reason was given for his rejection. Mr. Doe was listed as having twenty-four years of experience and having an associate and bachelor's degree. The position required a high school education or equivalent and food service experience with volume cooking.

work force assigned and other civilian staff hired.[63] Mr. Tallon stated that he believed these tasks and the timing element made the job unique and therefore worth an extraordinarily higher base pay. Mr. Tallon was asked whether in light of this "uniqueness" he could have re-classified the position (as Mr. Doe did on his own initiative a year later) or have offered a more moderate step increase. Mr. Tallon did not consider these options at the time.

When asked what he would have done if he had been unable to hire someone for the position, Mr. Tallon stated he would have had to get staff from other facilities to perform the work while the search for a permanent employee continued. Ms. Paulger, who ultimately approved the hire, also agreed that using staff from another facility was an option in that circumstance. This acknowledgement by both witnesses undermines the assertion that the job was unique. It also undermines the assertion that an outside applicant would have been the most qualified person to set up the new kitchen and that there was a "compelling" need to resort to §12.2.

d. Interview with the DHR Hiring Director – Molly Paulger

Ms. Paulger became the Personnel Division Services Director in the spring of 2003, not long before she approved Mr. Doe's hire. She worked for DHR within the Agency of Administration. As the person in charge of compensation administration for the state, she reviewed and approved hire-into-range requests. She stated that she had the sole authority to approve or deny these requests, and that no one reviewed her decisions. She also stated that it was her role to ensure compliance with state policy in the hiring process and she agreed that §12.2 outlined what was required of DOC and DHR with respect to hiring a new employee into range.

[63] The legislature passed the budget for staff salaries on July 1, 2003. Mr. Doe was hired in September of 2003 and the facility opened in October of 2003.

Ms. Paulger had no records or documentation on Mr. Doe's hiring and recalled very little about the request to hire him other than that SSCF was opening in October of 2003 and she knew staff was needed to fill positions. This investigation had requested, through the Attorney General's Office, that Ms. Paulger bring Mr. Doe's DHR hiring file(s), however she did not bring any file(s) with her. This investigation asked her why there were several pieces of required information missing from the DOC hiring file, since her position as its reviewer dictated that she should have known about its contents. Ms. Paulger could not recall whether documentation had existed or was just missing.

Ms. Paulger could not recall either who the internal DOC candidate was and did not know the location of the hiring certificate. When asked if she was aware of the agreement between VSEA and the State with respect to Woodstock and Windsor employees, she indicated that this issue would have been an internal matter for DOC's consideration and she did not recall having any information about what was happening at either facility. She simply recalled that SSCF was opening and knew there was a push to get staff in place. When Ms. Paulger was asked if she was surprised by the request to hire Mr. Doe at step 13, she stated she could not recall what she thought at the time. However she stated that if she were presented with the same request at the current time she would need to be presented with a "very good case" for such a request.

Ms. Paulger was asked why the "best" candidate - at least on paper - was chosen for a food service position instead of someone who might have been able to do the job just as well (or better) for less pay in light of the fact that §12.2 lists a "shortage of qualified applicants" as one of the central rationales of hiring a new employee into range. Her response was that she had more recently had the "why buy a Rolls Royce when a less expensive

model will do the job just as well"[64] conversation with hiring managers, but did not recall having it with Mr. Tallon when he put Mr. Doe forward. Therefore, the fact that there were two other two candidates with scores close to Mr. Doe's did not cause her to question Mr. Tallon or consider disapproving his request.

As noted above, Ms. Paulger acknowledged that existing staff could have been brought from other facilities to run the Springfield kitchen if DOC had not been able to hire someone for the job or if the hire had been delayed, but she had not discussed this alternative with Mr. Tallon since he did not raise the issue with her. She could not identify the "exceptional and outstanding qualifications [of Mr. Doe]" that "exceed[ed] those of other applicants…to such an extent that not hiring [Mr. Doe would have been detrimental] to the state."[65] In sum, Ms. Paulger failed to hold Mr. Tallon accountable for the information that §12.2 required him to provide as the appointing authority. She also failed to generate the information that §12.2 required DHR to generate as the hiring authority such as looking at the consequences to current and future staff, all of which implicated possible equal pay claims.

Ms. Paulger admitted that her lack of experience resulted in a failure to ask the right questions such as whether it was necessary to hire "the best" when "the best" was not needed for the particular job. She also stated that she would now need to be presented with a "very good case" for such a hire-into-range request. Had there been the required effort to identify and recruit an internal candidate, it could have determined whether that candidate was as viable a hire as Mr. Doe. The State would have then been presented with options which might have been not only more fiscally sound, but which also might have avoided basic unfairness and legal problems.

[64] This paraphrases the question and answer, but this was the example used.
[65] STATE POLICY AND PROCEDURES MANUAL §12.2 – this is a quotation from the hire-into-range policy.

The State offered no evidence that would allow either the hiring authority or the appointing authority to treat §12.2 in a discretionary manner, that is, to follow some, but not all of the procedures required by the policy. In 2003, a decision by the Vermont Labor Relations Board (VLRB), Grievance of Hooper,[66] found that hiring the most desired employee in that case was "invalid" because those doing the hiring failed to follow all of the hiring rules and procedures in order to get the employee they wanted.[67] From this investigation's perspective, Ms. Paulger ratified Mr. Tallon's hire-into-range request without question. She accepted Mr. Tallon's representations and overlooked the fact that information §12.2 required

[66] 27 VLRB 167 (2003).

[67] The Hooper decision lends support to the argument that hiring procedures need to be followed. In Hooper, the VLRB found the hiring of the external employee invalid and called for the hiring process to be re-initiated because those responsible for hiring that employee had not followed correct hiring procedures and had therefore prejudiced other internal applicants. In its decision, the Board wrote:

> …the Employer [State] contends that the rehire of Shea should not be impeded because she was an outstanding social worker and to make her and the Employer "jump through unnecessary hoops that would not have changed the end result makes no sense." This contention disregards the "Purpose and Policy Statement" of Policy 4.0, Recruitment…When a vacancy in the classified service occurs, the appointing authority shall make a diligent effort to recruit employees from within the classified service to fill the vacancy." The latter sentence of this statement is identical to 3 V.S.A. Section 327(a), which also is incorporated in Article 2 of the Contract. The provisions of the Personnel Policies and Procedures violated by the Employer in rehiring Shea… are the specific means to ensure adherence to the policy and purpose behind the merit system in state government, and it is inappropriate for the Employer to minimize compliance with them.

DOC to produce, was missing. She also failed to perform the analysis that §12.2 required of DHR and it has now led to a host of problems for the State.[68]

e. Conclusion: Reviewing the Law on the "Any Factor Other than Sex" Defense

In Knight v. G.W. Plastics, the federal district court of Vermont refused to grant G.W. Plastics' motion to dismiss a former employee's equal pay claim. The court took issue with G.W. Plastics on several fronts, including the following:

> ….the defendant points out that the plaintiff started her career at a lower salary. However the defendant has not adequately explained why salaries established two decades ago, which may or may not have been discriminatorily established in the first instance, justify continued wage disparity once the plaintiff allegedly began her duties as a supervisor in 1984.[69]

The court's first point was that the Equal Pay Act recognizes that present inequities can be the product of long-standing, systemic problems that may or may not be intentional, but a complainant need not show bad or ill intent. Ms. Deblois's present day pay inequity is the result of a hiring decision made in 2003. There is no evidence that Ms. Deblois was intentionally targeted however the decision to hire Mr. Doe into-range

[68] The Labor Board went on to say:

> …we disagree with the Employer's statement that to make…the Employer "jump through unnecessary hoops that would not have changed the end result makes no sense"….The Employer's mishandling of the process of the rehiring of Shea as Social Worker B and subsequent promotion to Interim Intake Supervisor was so serious as to result in Hooper being denied a fair opportunity to compete for the Intake Supervisor position. The Employer was required by statute, rules and the Contract to "make a diligent effort to recruit employees from within the classified service to fill [a] vacancy" that arises in the classified service. Here, the Employer's efforts to recruit employees from within the classified service to fill the vacancy in the Intake Supervisor position fell far short of "diligent"....[the offer of] the Intake Supervisor position to Shea…even though Shea was no longer in the classified service…was in complete disregard of this requirement.

[69] 903 F.Supp. 674 at 678. In Knight, the plaintiff, Marilyn Knight, had worked for defendant G.W. Plastics for 23 years. After her retirement she learned that the males who replaced her had been hired at salaries approximately $10,000 more than G.S. Plastics had paid her to perform the same job. Id. at 677.

operated like a time-traveling wrecking ball: it crashed (albeit unnoticed) into the orbit of the female FSS workers first, then swung out through the employment stratosphere and crashed into the female Business Manager's A/ASCIII's when Mr. Doe moved into that position in 2006. Theoretically speaking, if Mr. Doe moves to a new job, he will likely start at a higher salary than more experienced female comparators because of the manner he was originally hired and equal pay violations will continue. He even makes more than some of his superiors which should not be the case.

The second point made in Knight is the importance of the Equal Pay Act's remedial nature – that it remedies pay inequities between males and females even when the reason for the inequity is unintentional or is the result of negligence and inexperience as it appears to be here. Because of its remedial nature and its design to root out workplace gender-based pay inequities, any defense, such as the "any factor other than sex" actually has to have real meaning in order to achieve the statute's purposes.

The Second Circuit Court of Appeals, which governs Vermont, has taken the position that the "any factor other than sex" cannot be just "any" factor a respondent wishes to use.[70] Other circuit courts have interpreted the "any factor other than sex" defense as one that reflects a "legitimate

[70] Some circuit courts have interpreted the latter exception so broadly that the purpose of the law itself has been essentially eviscerated. See Ernest F. Lidge III, *Disparate Treatment Employment Discrimination And An Employer's Good Faith: Honest Mistakes, Benign Motives, And Other Sincerely Held Beliefs*, 36 Okla. City U. L. Rev. 45, 69-73 (2011); NATIONAL WOMEN'S LAW CENTER, *Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act*, pp. 1-3., April 12, 2011 (http://www.nwlc.org/resource/closing-factor-other-sex-loophole-equal-pay-act); Nat'l Women's Law Center, *The Paycheck Fairness Act Resolves the Debate Among Courts over the Meaning of the "Factor other than Sex" Defense*, p. 1, APRIL 12, 2011 (http://www.nwlc.org/resource/paycheck-fairness-act-resolves-debate-among-courts-over-meaning-factor-other-sex-defense); Ruben Bolivar Pagán, Note, *Defending The "Acceptable Business Reason" Requirement Of The Equal Pay Act: A Response To The Challenges Of Wernsing V. Department Of Human Services*, 33 J. Corp. L. 1007, 1025-27 (2008); Jessica L. Linstead, *The Seventh Circuit's Erosion of the Equal Pay Act*, 1 SEVENTH CIRCUIT REV. 129, 130 (2006); NOTE, *When Prior Pay Isn't Equal Pay: A Proposed Standard For The Identification Of "Factors Other Than Sex" Under The Equal Pay Act*, 89 Colum. L. Rev. 1085, 1089-90 (1989).

business reason" for the pay disparity.[71] Some courts have required the employer to articulate the reason[72] and some have given the employer *carte blanche* to come up with any reason whatsoever.[73] However the Second Circuit has required that employers demonstrate that there is a well ordered, fairly administered system in place that reflects objectivity and compliance with established rules and procedures. The EEOC is in agreement with the Second Circuit's strict interpretation of the "any factor other than sex" defense.[74]

In Aldrich v. Randolph Central School District[75], Cora Aldrich, a female cleaner at an elementary school, alleged that she performed the same work as male custodians for less pay, and sued pursuant to the EPA.[76] The school district used a job classification system that distinguished between "cleaners," who happened to be all women, and "custodians," who happened to be all men.[77] Custodians were paid higher wages than cleaners.[78] In order to be eligible for a custodian position, an individual had to place in the top three applicants on a civil service examination.[79] In defending against Ms. Aldrich's claim that the system violated the EPA, the school district argued that its civil service exam and job classification system constituted a "factor other than sex" defense *even if* custodians and cleaners performed

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[71] See Aldrich v. Randolph Central School District, 963 F.2d 520, 525 (2nd Cir. 1992).
[72] See, e.g., Belfi supra at 136 (noting that an employer seeking to rely on the "factor other than sex defense [ ] . . . must . . . demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential").
[73] See, e.g., Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (describing how the "factor other than sex" defense "embraces an almost limitless number of factors, so long as they do not involve sex").
[74] EEOC COMPLIANCE MANUAL §10-IV(F): "There is disagreement in the courts with regard to whether a factor other than sex must be based on the requirements of the job or otherwise beneficial to the business. The Commission agrees with the courts in the Second, Sixth, Ninth, and Eleventh Circuits that such a basis must be shown."
[75] 963 F.2d 520 (C.A. 2 NY 1992).
[76] Aldrich 963 F.2d at 522-23. She also sued under Title VII but that is not relevant to this case.
[77] Id. at 522.
[78] Id.
[79] Id.

the same work.[80] The district court granted the school district's motion for summary judgment and Ms. Aldrich appealed to the Second Circuit.

On appeal, the Second Circuit determined that the district court had improperly dismissed the case and held that the employer bore the burden of showing that the "factor other than sex" defense was a "bona fide business-related reason" for the resulting wage differential.[81] The Court noted that "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would *provide a gaping loophole in the [EPA] through which many pretexts for discrimination would be sanctioned*."[82] The Court also stated that "Once she [Ms. Aldrich] shows that she is being paid less than men for doing the same work, the employer can rely on an exam to justify that wage differential *only if the employer proves that the exam is job-related."*[83] Furthermore, in reviewing the legislative history of the EPA, the Second Circuit wrote: "After tracing the evolution of the EPA through the legislative process, we believe that Congress specifically rejected blanket assertions of facially-neutral job classification systems as valid factor-other-than-sex defenses to EPA claims."[84]

Ryduchowski v. The Port Authority of New York and New Jersey,[85] provides support to the idea that all defenses under the Equal Pay Act have to be legitimate. Ryduchowski considered the "merit system" defense in a

[80] Id. at 524.
[81] Id. at 526-27.
[82] Id. at 525. (emphasis added).
[83] Id. (emphasis added).
[84] Id. at 524.
[85] 203 F.3d 135 (C.A. 2 N.Y. 2000) The Second Circuit dismissed Port Authority's defense and remanded for trial, opining that a reasonable jury might find that they were not meritorious under the EPA.

claim by Ms. Ryduchowski, a civil engineer, against the New York Port Authority.[86] The Ryduchowski Court found that the Port Authority's so-called "merit system" violated the EPA in several respects. The court noted that a bona fide "merit system" should be an "organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."[87] The Court went on to note that the Port Authority had a "heavy burden;" that it was required to show it had "formulated an organized and structured system based on predetermined criteria."[88] In addition, it also had to prove that it "*systematically* administered its plans for a merit system."[89] The Court found there was "ample evidence that the Port Authority had failed to meet this burden"[90] and opined that "[w]ithout systematic evaluation, a *valid* merit system cannot be said to exist."[91]

The Court found that the jury could have concluded that the Port Authority failed to follow its own policies in determining merit increases (like DOC and DHR here failed to follow §12.2.)[92] Secondly, the Court stated that the jury could have found that the Port Authority "failed to properly correlate merit increases to an employee's evaluation."[93] The Court also found that a jury could have concluded that "the Port Authority's detailed evaluation

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[86] In Ryduchowski, the plaintiff filed claims under both the EPA and Title VII although only the EPA analysis is relevant here. Ms. Ryduchowski had come to the United States from Poland where she had received a Master's of Science and a Ph.D. in Civil Engineering from the University of Warsaw. In the subsequent twenty years following her education, "she gained practical experience and eventually became a licensed engineer in both New York and New Jersey. Between 1988 and 1995, she worked for the Port Authority as an engineer. In September 1995, she was terminated from her position with the Port Authority and sued. She asserted that the Port Authority failed to promote her and terminated her employment in violation of Title VII, and paid her less than a similarly situated male colleague in violation of the EPA. Ryduchowski at 137.
[87] Id. at 142-43 (quoting EEOC v. Aetna Ins. Co., 616 F.2d 719, 725 (4th Cir. 1980)).
[88] Id. at 143.
[89] Id. (emphasis in the original).
[90] Id.
[91] Id. (emphasis in original).
[92] Id.
[93] Id. (The plaintiff had been given merit increases both in and out of range and the Port Authority did not produce the chart that specified the appropriate range of the merit increase for each performance evaluation rating).

procedures were not systematically applied to all employees" and that "Ryduchowski's supervisors manipulated the evaluation process according to their personal whims and prejudices, and thereby prevented the merit system from being systematically applied."[94]

In sum, the Court opined that "the jury could have concluded that the Port Authority's merit system, while admittedly detailed, was not applied systematically, rendering a facially valid adequate merit system invalid as applied to Ryduchowski….It was the Port Authority's burden to convince the jurors that it applied a valid merit system. The jury's verdict reveals that the Port Authority simply failed to meet this burden."[95]

Both Aldrich and Ryduchowski emphasize the necessity of systematically following policies and procedures where those policies and procedures have an impact on pay equity. The Second Circuit has put a premium on having respondents produce evidence that procedures were followed and prove that those procedures resulted in systematic fairness. The Second Circuit does not consider the "any factor other than sex" defense as a green light for employers to do what they want to do when it results in pay inequity.

V: SUMMARY

Interestingly, in Ms. Silloway's case, the State made the last minute argument that the wage discrepancy between Mr. Doe and Ms. Silloway was due to the fact that Mr. Doe worked at a larger facility than Ms. Silloway. In fact the State identified SSCF as the largest facility in the State. The Human Rights Commission recognized this as an improper defense, but perhaps it should be noted here that Ms. Deblois's facility is larger than Mr. Doe's – she handles a larger budget and supervises more staff, but as noted, pursuant to

[94] Id. at 144. (In this case, the court believed that the jury could find the manipulation was the result of "gender prejudice of Ryduchowski's superiors...").
[95] Id. at 145.

the Equal Pay Act, this does not affect the fact that Ms. Deblois and Mr. Doe are comparators since DOC and DHR have recognized a common core of tasks for purposes of the prima facie case. Facility size does not factor into any of the defenses either, despite the State's continued efforts to seek any way it can to justify the wage differential between Mr. Doe and the other female comparators. These efforts fail because they have not presented or proven that there is a valid and lawful reason for the pay discrepancy.

The respondents were charged with the proper implementation of policy §12.2. Section 12.2, which if followed, does not represent a per se objectionable personnel policy and may serve a necessary function to draw talented expertise into State government. The HRC has not taken issue with the policy itself. However when the policy is not followed in critical ways by agencies appointed to administer it, then it cannot prevent unlawful outcomes such as this one and the end result is unlawful pay discrimination against Ms. Deblois.

RECOMMENDATION

The Respondents' failure to follow state laws and policies resulted in a significant salary differential between Ms. Deblois and Mr. Doe, despite Mr. Doe's seniority. The Respondents have failed to produce evidence and prove any of the four affirmative defenses recognized under the EPA and the Vermont Fair Employment Practices Act. As a result, this investigation recommends in case E13-0006, that the Human Rights Commission find **reasonable grounds** to believe that all named Respondents violated the equal pay provision of the Vermont Fair Employment Practices Act, Title 21 V.S.A. §495(8)(A).

5/7/13

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